ERIE-YORK DOCTRINE DOES NOT GOVERN FEDERAL RULES OF CIVIL PROCEDURE

Hanna v. Plumer
380 U.S. 460 (1965)

Plaintiff filed a complaint in a federal district court in Massachusetts against the executor of an alleged negligent driver for injuries resulting from a collision between plaintiff's auto and that of the decedent. Jurisdiction was based on diversity of citizenship and service was made pursuant to Federal Rule of Civil Procedure 4(d)(1)[1] by leaving copies of the summons and complaint with defendant's wife at his residence. In his answer defendant claimed the service was invalid since plaintiff had not complied with a Massachusetts statute which required that a creditor of a deceased serve the personal representative "in hand."[2] Subsequently defendant moved for summary judgment on the grounds that *Erie* and its progeny[3] compelled the application

[1] Fed. R. Civ. P. 4(d)(1):

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

[2] Mass. Gen. Laws Ann. ch. 197, § 9 (1955) provides in part:

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate . . . .

[3] Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). *Erie* gave rise to the "substance-procedure" dichotomy and the federal policy opposed to forum-shopping and discrimination against residents of the forum state. Guaranty Trust Co. v. York, 326 U.S. 99 (1945), modified the "substance-procedure" doctrine by invoking the now familiar "outcome determinative" test which required that the result in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation as it would be if tried in a state court. In Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949), and Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the Court used this test to apply state law to rules 3 and 23 respectively. *Ragan* held that the filing of a complaint pursuant to rule 3 was not sufficient to toll the state statute of limitations if the state law required not only the filing of a complaint but personal service upon the defendant to toll the statute.

of the Massachusetts statute in lieu of rule 4(d)(1). The district court, relying on *Ragan v. Merchants Transfer Co.*[4] and *Guaranty Trust Co. v. York*,[5] granted the motion. The Court of Appeals for the First Circuit found that the Massachusetts statute was a substantive rather than a procedural matter and affirmed.[6] The United States Supreme Court granted certiorari[7] and reversed,[8] holding *inter alia* that the *Erie* doctrine[9] does not compel application of a conflicting state rule in lieu of rule 4(d)(1).

Although the Supreme Court may never have been faced with a direct clash between state law and the federal rules prior to *Plumer*, the lower courts have on occasion been confronted with the issue.[10] There have also been numerous occasions in which courts have chosen state law to fill the interstices left by the terse language of the federal rules.[11] It is in these latter situations

Cohen held that when a state statute requires a deposit of security for reasonable litigation expenses as a prerequisite to bringing a stockholder's derivative suit in state court, such statute should be applicable to a like action based on diversity of citizenship, brought in a federal district court in that state. It is noteworthy that the Court in *Plumer* does not see these last two cases as presenting a direct clash between the federal rule and the state law. Rather the Court characterizes them as instances where the state law was not within the scope of the federal rule and thus was applicable under traditional *Erie* analysis. See text accompanying note 41 *infra*. The "outcome determinative" test remained basically unchanged until Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958), was decided. There the *York* test was made subject to "affirmative countervailing considerations" of federal policy. In the instant case defendant specifically relied on *Erie* and *York*, alleging that use of rule 4(d)(1) would alter the outcome of the case. For a more detailed history of the *Erie* decision, see Boner, "Erie v. Tompkins: A Study in Judicial Precedent," 40 Texas L. Rev. 509 (1962).

[4] 337 U.S. 530 (1949).

[5] 326 U.S. 99 (1945).

[6] Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964), 78 Harv. L. Rev. 673 (1965). The First Circuit held the statute substantive on the grounds that it was a clear expression of state legislative policy. Plaintiff had also filed the alternative notice in the registry of probate, but the district court held it invalid.

[7] Hanna v. Plumer, 379 U.S. 813 (1964).

[8] 380 U.S. 460 (1965).

[9] See note 3 *supra*.

[10] 380 U.S. at 472. See Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965), discussed in note 17 *infra*; Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963), discussed in text accompanying note 18 *infra*; Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960), discussed in note 38 *infra*; Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960), discussed in text accompanying note 20 *infra*.

[11] *Fed. R. Civ. P. 3*: Plaintiff must satisfy the state requirements for tolling the statute of limitations in federal as well as state court. Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949). *Fed. R. Civ. P. 4*: Under rule 4(d)(3) the amenability of a foreign corporation to suit is determined by the law of the state. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963). See generally 2 Moore, Federal Practice ¶ 4.25[7] (2d ed. 1964). *Fed. R. Civ. P. 8*: State Law controls the burden of proof on particular defenses. Palmer v. Hoffman, 318 U.S. 109 (1943). *Fed. R. Civ. P. 13*: State law prevails when the counterclaim is barred by the statute of limitations. Keckley v. Payton, 157 F. Supp. 820 (N.D.W. Va. 1958). *Fed. R. Civ. P. 14*: While the right to proceed in a

that the *Erie-York* doctrine is omnipresent. These results have been criticized,[12] and some authors have even suggested that Congress might well consider whether diversity jurisdiction should be continued.[13] But after *Byrd v. Blue Ridge Rural Elec. Co-op.*[14] some appellate courts began, in certain instances, to exercise a new freedom in determining the validity and the applicable scope of the federal rules[15] by using two different theories to attenuate the strict "substance-procedure" or "outcome determinative" analysis.

The first of these theories operated under the rationale that Congress, in

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third party action is established by federal rule, such right depends upon the existence of a state created liability. General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965); Travelers Ins. Co. v. Busy Elec. Co., 294 F.2d 139 (5th Cir. 1961). *Fed. R. Civ. P. 17*: State law determines the real party in interest. Wright v. Schebler Co., 37 F.R.D. 319 (S.D. Iowa 1965). *But see* Beckley v. Trustees of Orangebury Regional Hosp., 35 F.R.D. 516 (E.D.S.C. 1964). *Fed. R. Civ. P. 23*: State law determines the extent to which an effort to obtain stockholders' action is a condition precedent to the maintenance of a derivative action and federal law determines the method of pleading. Steinberg v. Hardy, 90 F. Supp. 167 (D. Conn. 1950). State rules which do not conflict with the federal rule, but which are actually outside its scope are applicable. Cohen v. Beneficial Indus. Loan Co., 337 U.S. 541 (1949). *Fed. R. Civ. P. 25*: State law determines whether an action abates with the death of a party. Perkins v. Rich, 204 F. Supp. 98 (D. Del. 1962). *Fed. R. Civ. P. 26, 34*: State law governs what is privileged in a diversity action. Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962); Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963). *Fed. R. Civ. P. 37*: State rule of privileged communications shall prevail over provisions in rule 37 for failure to answer questions asked while taking deposition. Merlin v. Aetna Life Ins. Co., 180 F. Supp. 90 (S.D.N.Y. 1960). *Fed. R. Civ. P. 43*: Most federal courts follow state law as to what constitutes a privileged communication. Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962); *cf.* Monarch Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); see generally Annot., 95 A.L.R.2d 320, 331 (1964). *Fed. R. Civ. P. 50*: Whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction rests solely on diversity of citizenship has not yet been decided by the United States Supreme Court. Dick v. New York Life Ins. Co., 359 U.S. 437, 444-45 (1959). The following courts would apply state standards: Dean v. Southern R.R., 327 F.2d 757 (6th Cir. 1964); Evans v. S. J. Groves & Sons Co., 315 F.2d 335, 342 n.2 (2d Cir. 1963). *Fed. R. Civ. P. 71A*: State law should be consulted to determine what constitutes real property for the purpose of federal condemnation. United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962). See generally Hawkins, "The Erie Doctrine Versus the Federal Rules," in Proceedings of the 1964 Nineteenth Annual Miss. Law Institute on Fed. Practice and Procedure 297.

[12] Hill, "The Erie Doctrine and the Constitution," 53 Nw. U.L. Rev. 427 (1958). Professor Hill concludes that the federal rules should be amended in order to provide for enforcement of substantial state policies while at the same time preserving federal policies.

[13] See, *e.g.*, Quigley, "Congressional Repair of the Erie Derailment," 60 Mich. L. Rev. 1031 (1962). After an attack on the present situation the author concludes that a congressional amendment to the Rules Enabling Act and the federal rules is necessary.

[14] 356 U.S. 525 (1958).

[15] See generally Vestal, "Erie R.R. v. Tompkins: A Projection," 48 Iowa L. Rev. 248 (1962).

passing the Rules Enabling Act,[16] was acting under its constitutional authority derived from article III and the necessary and proper clause, to prescribe the practice and procedure in the federal courts, and when the Supreme Court promulgated a rule pursuant to the Rules Enabling Act, a prima facie presumption arose that such rule was procedural and thus not violative of the *Erie* doctrine.[17] In *Lumbermen's Mut. Cas. Co. v. Wright*[18] the issue was whether the district court was required to follow a Louisiana abandonment-for-failure-to-prosecute statute instead of controlling its own docket by using rule 41(b). The Fifth Circuit held that the abandonment provision was in a penumbral area—a twilight zone between substance and procedure—and in such cases, where there is a congressional mandate (the rules) supported by constitutional authority, the federal rule should be applied without regard to "outcome determinative" considerations.[19] Thus for courts applying this theory, a federal rule which can be interpreted as covering the controversy will be given effect unless it is demonstrated that the rule is clearly substantive.

The second theory devised to test the applicability of a federal rule involves a balancing of federal and state policy. In *Monarch Ins. Co. v. Spach*[20] a Florida rule provided that written statements taken from an injured person were inadmissible in any civil action unless a copy of the statement was first given to the injured person. The district court applied the state statute in lieu of rule 43(a) but the Fifth Circuit reversed holding that the federal rule and the Rules Enabling Act must be viewed as strong federal policy giving federal courts the capacity to regulate the manner by which facts are to be presented. Moreover, since the overall state and federal practice both generally favored

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[16] 28 U.S.C. § 2072 (1964), which provides in part:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury . . . .

[17] See Moss v. Associated Transp. Inc., 344 F.2d 23 (6th Cir. 1965). In this case the issue was whether the district court judge could, pursuant to rule 42(b), separate the issues of liability for trial prior to the issues of damages when Tennessee law would not have permitted such separation. In holding the application of rule 42(b) valid the court stated that the Rules Enabling Act authorized the promulgation of rule 42(b) and "the importance of maintaining uniform procedure in federal trials calls for a clear showing of possible substantive impact before departing from the federal rules." *Id.* at 27.

[18] 322 F.2d 759 (5th Cir. 1963).

[19] Other courts applying a similar rationale: Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959) [upholding rule 25(a)]; D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958) (upholding rule 14). See generally Comment, "The Constitutional Power of Congress to Control Procedure in the Federal Courts," 56 Nw. U.L. Rev. 560 (1961).

[20] 281 F.2d 401 (5th Cir. 1960). For a criticism of the balancing test and of the *Monarch* decision, see Smith, "Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation," 36 Tul. L. Rev. 443 (1962).

disclosure, admission of the statement would not thwart the basic state policy, notwithstanding that it violated the particular statute. In *Arrowsmith v. United Press Int'l*[21] the issue was whether rule 4(d)(3) was to be interpreted as impliedly requiring a federal standard of doing sufficient business within the state for amenability to process. Concluding that state policy as reflected by the state standard should prevail the Second Circuit stated:

> [W]e fully concede that the constitutional doctrine announced in Erie R.R. v. Tompkins . . . would not prevent Congress or its rule-making delegate [the Supreme Court] from authorizing a district court to assume jurisdiction over a foreign corporation although the state court would not. . . . But we find no federal policy that should . . . override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule.[22]

Hence, under the balancing test, a court chooses the applicable law and tests the validity of a federal rule on the basis of whether a particular policy —federal or state—is stronger,[23] or whether the policies are consistent in purpose, in which case the federal policy reflected by the rules is controlling.[24]

It will be observed that under these theories the *York* "outcome determinative" test has little if any explicit effect upon the courts' analyses of what law should be applied.[25] Instead the courts treat the problem in terms of the basic prohibition extracted from *Erie*—federal courts should not infringe upon state substantive law when jurisdiction is based solely on diversity of citizenship. Consequently, the resolution of this problem under these two theories depends on the court's ability to characterize the particular area affected by a federal rule as substance or procedure.

In completing the break[26] from an *Erie-York* based analysis of a federal

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[21] 320 F.2d 219 (2d Cir. 1963), *overruling* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

[22] *Id.* at 226. Other cases applying a similar balancing rationale: Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962) (applying state physician-patient privilege to rule 26); Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960) (applying state rule prohibiting a declaratory judgment action in lieu of rule 57). The balancing test finds some support in Hill, *supra* note 12, at 595-96.

[23] Arrowsmith v. United Press Int'l, *supra* note 21, at 226.

[24] See note 20 *supra*.

[25] In D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958), the issue was whether rule 14 could be used when the state did not provide for third-party impleader. In deciding that rule 14 was authorized by the Rules Enabling Act and therefore procedural the court states:

> If cases like Guaranty Trust Co. v. York . . . contain language which might seem to point to the opposite conclusion, we are prepared, if it were necessary, to hold that the language used must be confined to the special fact situations with which the Court was then undertaking to deal; and so regarded we do not think those cases controlling here.

Id. at 910-11.

[26] The word "completing" is used because the Court states:

Although this Court has never before been confronted with a case where the

rule, *Plumer* expressly states that "the rule of *Erie R. Co. v. Tompkins* [does not constitute] the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure."[27] The Court admits that "the broad command of Erie was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law."[28] But there the similarity ends because each was created for a different purpose. *Erie* was partly an attempt to effectuate the equal protection clause by preventing discrimination against residents of the forum state and partly an attempt to eliminate forum-shopping; *York* was an outgrowth of attempts to effectuate *Erie*. On the other hand, the federal rules were created to avoid local rules and to produce uniformity of procedure in the federal courts. Behind the rules stands an act of Congress, and when the applicability of a federal rule is challenged, the question facing the court is not merely one of effecting the policies of *Erie* and *York*; rather it is whether "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[29] This question can be answered in the affirmative only after a showing that the rule clearly regulates substantive rights and duties created by state law, or that it transcends constitutional rights. The possibility that the federal rule may change the outcome of the case and contravene *York* now seems of minor importance unless the variation is so significant that it denies equal protection of the law.

Stated succinctly, the *Plumer* rationale involves two steps: (1) whether a particular rule exceeds the congressional mandate of the Rules Enabling Act[30] by attempting to "abridge, enlarge or modify any substantive right,"[31] and (2) whether the rule itself is constitutional. The first step involves the traditional "substance-procedure" classification in which the Court provides a means for deciding the close case: only matters *not* rationally capable of being classified as procedural are within the "substantive right" prohibition of the Rules Enabling Act.

But what is procedure? The Court uses the rather nebulous definition originally stated in *Sibbach v. Wilson*:[32] "the judicial process for enforcing

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applicable Federal Rule is in direct collision with the law of the relevant State, courts of appeals faced with such clashes have rightly discerned the implications of our decisions.

380 U.S. at 472.

The Court then quotes from and approves the rationale used in the *Lumbermen's Mutual* case discussed in text accompanying note 18 *supra*. Thus arises the inference that by approving the break from a strict *Erie* analysis upon its first opportunity to consider the issue, the Court is completing a process of evolution originally started with *Byrd* and carried on by some appellate courts.

27 380 U.S. at 469-70.

28 380 U.S. at 465.

29 380 U.S. at 471.

30 28 U.S.C. § 2072 (1964). The text of the section is at note 16 *supra*.

31 28 U.S.C. § 2072 (1964).

32 312 U.S. 1 (1941). See generally Schlagenhauf v. Holder, 379 U.S. 104, 112-14 (1964), 26 Ohio St. L.J. 679 (1965).

rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[33] The breadth of this definition of procedure must be further extended by the modifying term "rational," which is intended to eliminate disputes in the unclear area separating substance from procedure. The decision in *Plumer* does not establish any new tests for distinguishing substance from procedure, but it does propound a test similar to a burden of proof: unless it is clearly demonstrated that the rule regulates substance, it is presumed to be procedural. Restated, if reasonable men could differ in classifying the particular rule, then it is rationally procedural and must be applied in lieu of the conflicting state rule.

But even though rationally procedural, the rule itself must be constitutional. The manner in which a procedural rule might be unconstitutional is not expressly treated, but the Court does mention the equal protection clause as one of the grounds for the *Erie* decision and presumably a particular rule would violate that clause if it were so different from a corresponding state procedure that it caused grave discrimination against citizens of the state in favor of noncitizens. Furthermore, a rule could undoubtedly be procedural and still violate one of the rights guaranteed by the first eight amendments of the Constitution, especially due process.

After replacing the *Erie* doctrine with a new basis for testing a federal rule, the Court states that even if a difference in outcome were the only test, the federal rule in this case would still have prevailed. Many times after litigation begins, unanticipated "substance-procedure" conflicts often arise and a resolution of such conflicts will usually affect the outcome of the litigation, depending upon whether federal or state law is applied. But no matter what law is applied *once the conflict has arisen*, it will have little or no effect upon a litigant's choice of forum, nor will it foster discrimination against citizens. For these policy reasons the Court states that in the future the "outcome determinative" test is to be applied only from a prospective point of view, *i.e.*, whether a litigant would sue in a federal court rather than a state court because he knew beforehand that his suit would come out differently. However, such differences in outcome must be *substantial* and not merely due to the fact that the federal and state court systems are not identical. In *Plumer*, after testing rule 4(d)(1) by the prospective difference-in-outcome analysis, the Court concluded that application of the rule would foreseeably only have altered the method of serving process. It would not have changed the outcome nor would it have raised the kind of discrimination feared in *Erie*.

Mr. Justice Harlan in his concurring opinion argues that the majority's rationale establishes the federal rules as a body of law absolute, subject only to a simple forum-shopping test.[34] If this is true, courts could be induced to extend the scope of particular rules beyond their express provisions to include all rationally procedural matters in order to enforce a policy of uniform procedure in the district courts. Under such a result, cases applying state procedure under the *Erie-York* doctrine could be overruled for using an incorrect

[33] 312 U.S. at 14.

[34] 380 U.S. at 475-76.

test. Other cases applying state procedure under the balancing test[35] could be overruled on the grounds that *Plumer* establishes sufficiently strong federal policy in the federal rules area to override conflicting state policy even in situations where the rules do not *expressly* apply.[36]

But, does *Plumer* go too far? Mr. Justice Harlan believes it does for he argues that making the federal rules virtually inviolate will result in frustrating legitimate state policy.[37] And possibly there are areas which may be rationally classified as procedural, but which may also involve substantial and contrary state policy, the ignoring of which may greatly affect the outcome of the case and thereby foster the *Erie* fears of forum-shopping and discrimination.[38] Perhaps these are the situations which the Court had in mind when it reserved some flexibility short of absolute application of the federal rules.[39]

Since *Plumer* was a direct clash between a federal rule and a contrary state law, the prima facie superiority of the rules in such situations in the future is clear. However, the greater effect of the *Plumer* rationale will center

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[35] See notes 20-22 *supra*.

[36] This would seem to be especially applicable to the *Arrowsmith* case discussed in text accompanying note 21 *supra*, where the Second Circuit expressly stated that it would have applied a federal standard if it could have found a sufficiently strong federal policy compelling such a result.

[37] 380 U.S. at 475. See Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962), where the Second Circuit used a similar rationale in applying the state physician-patient privilege to rule 26.

[38] As to the idea that substantial state interest should be recognized, see Hill, *supra* note 12, at 595-96. Consider the problem presented by Allstate Ins. Co. v. Charneski, *supra* note 22, where the issue was whether a Wisconsin decision expressly prohibiting the use of declaratory judgment actions by insurance companies should be applied in lieu of rule 57. Wisconsin has a unique practice which allows the injured party to sue the insurer directly and obviates the necessity of first suing the alleged tortfeasor. The Seventh Circuit feared that allowing the insurer to obtain a declaratory judgment of its liability against its insured would frustrate the state "substantive" policy and give rise to forum-shopping. The court therefore refused to apply the federal rule by using the balancing test. Presumably, a declaratory judgment is part of the overall "judicial process" for enforcing rights and duties, is rationally procedural, and thus is applicable under the *Plumer* test. The *Allstate* case could be overruled. But is this a desirable result? The Seventh Circuit's fears seem likely to materialize under such a result. Consider also the virtually uniform practice of recognizing state rules of privilege in the application of rules 26, 34, and 37. See Massachusetts Mut. Life Ins. Co. v. Brei, *supra* note 22; Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963); Merlin v. Aetna Life Ins. Co., 180 F. Supp. 90 (S.D.N.Y. 1960). See generally Annot., 95 A.L.R.2d 320, 331 (1964). Are these privileges "rationally procedural" under *Plumer* when considered in the context of the federal rules involved?

[39] The Court reveals this intention when it states:

> [A] court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts . . . .

380 U.S. at 473.

around the cases in which the courts must decide exactly what is implicitly included in the language of any particular rule. For example, in *Ragan v. Merchants Transfer Co.*,[40] the Court, although it did not choose to do so, could have held that rule 3 implicitly provided that filing the complaint tolls the statute of limitations as well as commences the action. In fact the Court in *Plumer* distinguishes *Ragan* as a case in which "the *scope* of the Federal Rule was not as broad as the losing party urged, and therefore there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law."[41] And yet in *Plumer* the Court is willing to read into rule 4(d)(1) that in-hand service is not required in federal courts.[42] Mr. Justice Harlan[43] as well as one of the first district courts[44] to treat *Plumer* agree that this distinction is a false one.

In conclusion, the rationale of the *Plumer* case can be seen as presenting two general, but perhaps contradictory, proposals. On the one hand the authoritative language of the Court's opinion can be read to permit a district court to construe a federal rule as impliedly including all matters which are rationally procedural but do not give rise to equal protection arguments. Such power could be pursued under the aegis of the federal goal of uniform procedure and the article III provision for a federal court system. But, if this rationale is accepted an accompanying result will be the emergence of a vast federal common law based on how the various federal jurisdictions interpret the federal rules.

On the other hand, if *Ragan* as well as *Cohen v. Beneficial Indus. Loan Corp.*[45] are still good law, one can argue that the rules should be strictly construed and limited to their explicit statements. Any interstices left by this interpretation should then be filled in by state law. Although the first proposal is arguable under the language used in *Plumer* and perhaps would be the most effective method of freeing federal courts from local rules, the fact that the *Plumer* decision does not expressly overrule or discredit any of the *Erie* progeny, but cites many of those cases for support, points to the conclusion that a strict reading of the rules is more likely to be followed.[46]

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40 337 U.S. 530 (1949). See note 3 *supra* for a discussion of *Ragan*.

41 380 U.S. at 470. (Emphasis added.)

42 The Court states: "Here, of course, the clash is unavoidable; rule 4(d)(1) says—*implicitly*, but with unmistakable clarity—that in hand service is not required in federal courts." *Ibid.* (Emphasis added.)

43 *Id.* at 476-77.

44 Sylvesteri v. Warner & Swasey Co., 244 F. Supp. 524 (S.D.N.Y. 1965). The facts presented a situation almost identical to that in *Ragan v. Merchants Transfer Co.*, discussed in notes 3 & 11 *supra*, the issue being whether the statute of limitations was tolled by merely filing the complaint under rule 3 or by personal service within 60 days after the statute of limitations expired as required by state law. In holding rule 3 applicable the court expressed concern over the fact that *Plumer* did not expressly overrule *Ragan*, but concluded that the Supreme Court after *Plumer* would no longer follow *Ragan*.

45 337 U.S. 541 (1949), discussed at note 3 *supra*.

46 If this indication is valid, then it seems that Sylvesteri v. Warner & Swasey Co.,

It is important to remember that the Court views *Plumer* as presenting to it, for the first time,[47] a direct confrontation of state law with one of the federal rules. In order to dispel any doubts about the propriety of the rules or the federal goal of uniformity of procedure, it was necessary for the Court to speak in strong and affirmative terms. However, now that it has confirmed the constitutionality of federal power to control the practice and procedure in the federal court system, perhaps in future decisions it will explain more precisely the extent that a court, in testing the validity or interpreting the scope of a federal rule, may consider the degree to which a federal rule can permissibly vary the litigation from the course it would have followed in the state court.

supra note 44, was incorrectly decided. See Kuchenig v. California Co., 350 F.2d 551, 553-57 (5th Cir. 1965), which provides support for the view that, after *Plumer*, past decisions like *Ragan* and *Cohen* and the rest of the *Erie* progeny still have precedential value in the federal rules area.

[47] See note 26 *supra*.